COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

June 5, 2008

Docket No. WET-2008-006
DEP File No. SE 15-1768
Dartmouth

In the Matter of Jose Verissimo

RECOMMENDED FINAL DECISION

This appeal involves the construction of a single family house and lawn on property in Dartmouth, Massachusetts where the delineation of bordering vegetated wetland is disputed. The work is subject to jurisdiction under the Wetlands Protection Act. The notice of intent was filed by, and the order of conditions was issued to, a previous owner of the property. The Dartmouth Conservation Commission (the "Commission") issued the order of conditions on December 10, 2003. The Southeast Office of the Massachusetts Department of Environmental Protection (the "Department") issued a superseding order of conditions on December 19, 2007 to Mr. Jose Verissimo (the "Applicant"), who had acquired the property from the previous owner.[1] The appeal was filed by Ms. Diana Mayer, a trustee of abutting property, on behalf of the 18 High Street Nominee Trust (the "Petitioner").

[1] The lapse of time between the issuance of the order of conditions and the superseding order of conditions is attributed to health problems of the Department staff person assigned to the case.

While the appeal was not filed within the ten-day jurisdictional time period specified in the wetlands regulations, the petitioner raised the issue of tolling, which if applicable would allow her appeal to be accepted on the grounds that it had been sent to an address where she no longer resides. A second issue was whether the Petitioner has standing to appeal. The third issue was whether the bordering vegetated wetland boundary has already been determined in a prior order of conditions, or, if not, whether the boundary is accurate. The final issue was whether the work meets the standard in 310 CMR 10.53(1) for work in the buffer zone. The Applicant submitted an amended plan during the course of the hearing. Accordingly, the parties also addressed whether to accept the plan changes, and if so, whether the project would meet the criteria for work in the buffer zone. The Petitioner, the Applicant, and the Department each presented direct cases and the petitioner filed a rebuttal, but the parties decided to submit their cases for a decision on the record under 310 CMR 1.01(13)(g).

I acknowledge several circumstances arising in this case that made its resolution difficult. There was a four year gap between the issuance of the local order of conditions and the Department's superseding order, far exceeding the statutory seventy day timeline. The superseding order was sent to the Petitioner, but to an outdated address. There was a prior order of conditions for related work at the site that had been extended by the Commission. A wetlands boundary delineation confirmed in an even earlier determination of applicability was used in the two notices of intent and subsequent orders of conditions, although only this order was appealed. At the time of issuing the superseding order, the Department staff relied upon the boundary delineation in the unappealed order. After realizing that the documentation related to the extensions was

not in the files, the Department staff performed a review of the wetlands boundary and the project as originally proposed. Meanwhile, the Applicant submitted an amended plan, which by all accounts reduced any potential for wetland impacts but nonetheless did not receive the endorsement of either the Petitioner or the Department.

In preparing this Recommended Final Decision, I sought guidance from prior Department cases, the Department's Delineation Manual for Bordering Vegetated Wetlands, and the Department's Plan Change Policy. After finding that the appeal was timely because of the failure of notice to the Petitioner, I reviewed the direct cases presented by the parties within the context of Department cases and policies. I conclude that the amended plan meets the requirements of the plan change policy and the standard for work in the buffer zone. Accordingly, I recommend that a final order of conditions be issued to the Applicant for this amended plan.

I. <u>Whether the Appeal was Timely</u>

An appeal of a superseding order of conditions must be filed within ten business days of issuance by the Department. 310 CMR 10.05(7)(j)(2)(a). While the appeal in this matter was not filed within the ten day jurisdictional time period specified in the wetlands regulations, the Petitioner raised the issue of tolling due to failure of notice of the issuance of the superseding order, which if applicable would allow the appeal to proceed. The Department and the Applicant filed motions to dismiss for lack of jurisdiction because the appeal was not timely filed. The Petitioner opposed the motion, stating that the Department had used an incorrect address and the copy sent to the Trust's attorney also was not timely delivered because the law firm had changed its address. I conclude that the ten day period is appropriately tolled in these unusual circumstances where the

mailing of the superseding order was ineffective and notice of issuance of the superseding order was not communicated to the Trust. The appeal is valid because it was timely filed within ten days as tolled after issuance.

A. Facts

The superseding order was sent by certified mail to Mr. Verissimo, with copies to other parties, including the 18 High Street Nominee Trust's representative at Rackemann, Sawyer & Brewster at One Financial Place in Boston, and Diana Mayer, a trustee, at an address in New York. Diana Mayer (the Petitioner) filed an appeal on January 7, 2008. Ms. Mayer is a trustee of 18 High Street Nominee Trust, which owns property in South Dartmouth at 18 High Street that abuts the Applicant's property.

Ms. Mayer had filed a request for a superseding order on December 19, 2003 with her letterhead indicating her address as 18 High Street, Dartmouth. Ms. Mayer used the 18 High Street address in the letterheads of all her direct correspondence with the Department. She states that she has lived at 18 High Street since December 2003. In letters to the Dartmouth Conservation Commission dated November 21 and 24, 2003, Ms. Mayer indicated her address in letterheads as 200 East 65th Street in New York City. The Department used the New York address in each of its three letters relating to this project where Ms. Mayer received a copy (December 31, 2003, January 22, 2004, and December 19, 2007).[2] The Department notes that Ms. Mayer did not provide notice that it should use the 18 High Street address. Ms. Mayer notes that despite her consistent use of the 18 High Street address in communications with the Department, the Department continued to use the New York address. The fate of the copy of the superseding order

[2] The Department acknowledges that Ms. Mayer, as a trustee of the nominee trust, was entitled to notice, either directly to her or through her representative. It is not clear whether it is the Department's practice to continue to use addresses of record before the conservation commission.

sent to Ms. Mayer in New York is not known, but Ms. Mayer states that she has no knowledge of it. Affidavit of Diana K. Mayer dated February 28, 2008, attached to her Opposition to Motion to Dismiss.

Ms. Mayer's request for a superseding order on December 19, 2003 was not accompanied by the requisite filing fee and apparently was incorporated into a subsequent appeal filed by Zachary D. Drench, a lawyer at Rackemann, Sawyer & Brewster at One Financial Center, Boston, on behalf of 18 High Street Nominee Trust on December 22, 2003.[3] A copy of the superseding order was sent to the Trust, care of Mr. Drench, at One Financial Place, Boston, on December 19, 2007. However, the firm had relocated in October 2007 to 160 Federal St., Boston. The envelope shows that the letter was forwarded by the U.S. Postal Service to the firm's new location on January 17, 2008, and a firm lawyer reported locating it on January 24, 2008. Affidavit of Gareth I. Orsmond dated February 25, 2008, attached to Opposition to Motion to Dismiss.[4] Ms. Mayer reports that she called the law firm on January 7, 2008 to inquire whether the firm had received the superseding order and was told it had not. It is unclear whether any of the delay in delivery is attributable to the error in the building name in the prior address, which is One Financial Center, not One Financial Place.

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[3] This request for a superseding order did not mention Ms. Mayer, but James Carroll was provided a copy and also was identified as the person making the request on behalf of the Trust at an address in Vermont on the fee transmittal form that accompanied the request. Ms. Mayer attached an affidavit from Mr. Carroll, stating that he did not receive a copy of the superseding order of conditions. Where more than one individual is associated with a request for a superseding order, the Department was not remiss in determining that Rackemann, Sawyer & Brewster was representing the Trust and in providing copies to Ms. Mayer as an active participant.

[4] The last communication prior to the superseding order from the Department that was sent to the Trust's representative at Rackemann, Sawyer & Brewster in the record is dated January 22, 2004; it is a copy of a letter from the Department to the original applicant advising of the need for review by the Massachusetts Historical Commission. The individual at the firm to whom the letter was addressed, Zachary Drench, apparently left the firm in 2006. Affidavit of Gareth I. Orsmond dated February 25, 2008, attached to Opposition to Motion to Dismiss.

B. Discussion

Under the procedural rules governing wetlands appeals, notice must be filed with the Department "no later than ten business days after the date of issuance of the Reviewable Decision." 310 CMR 10.05(7)(j)(2)(a). The appeal period begins when the Department issues the reviewable decision rather than when parties receive it. See Matter of Peter van Rosbeck and Karen van Rosbeck, Docket No. 96-031, Final Decision (June 25, 1996) (Mailing rather than receipt triggers the ten day appeal period); Matter of R & R Home Construction Corp., Docket No. 95-009, Final Decision (April 14, 1995) (appeal period begins to run on the day after a wetlands permit is issued, not on the date of its receipt). Furthermore, any party "that fails to timely file an Appeal Notice . . . shall be deemed to have waived its right to appeal the Reviewable Decision." 310 CMR 10.05(7)(j)(2)(a). The Department has long held that the ten day period is jurisdictional. See, e.g., Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993). There is no dispute that the Petitioner did not file within this ten day period.

In unusual circumstances, the Department has recognized that the ten day appeal period may be tolled where legally required notice was not given to a party entitled to receive it and where the failure to obtain notice caused that party to fail to file an appeal in a timely manner. The Department and the Applicant argue that tolling should not be allowed because the case at hand is factually distinguishable from all the cited cases where tolling was granted. I have identified no prior administrative case precisely on point, but have considered the underlying principles. See, e.g., Matter of Donald Bianco, Docket No. 93-063, Decision on Department's Motion to Dismiss (Nov. 7, 1995); Matter

of Bay Park Development Trust, Docket No. 88-291, Final Decision, (March 31, 1989); Matter of Geoffrey Lenk, Docket No. 95-077, Final Decision (Feb. 6, 1996); See also, Matter of Cross Point Limited Partnership, Docket No. 95-088, Final Decision (April 30, 1996); Matter of Joseph DeMaio, Docket No. 97-063, Final Decision (April 9, 1998); Matter of Peter van Rosbeck and Karen van Rosbeck, Docket No. 96-031, Final Decision (June 25, 1996).[5]

The ten day period has been tolled where parties who are entitled to notice fail to receive it. In other words, a relevant question is whether notice was received, not only whether notice was properly given. See Matter of Joseph DeMaio, Docket No. 97-063, Final Decision (April 9, 1998), citing Michelin Tires (Canada) Ltd. V. First National Bank of Boston, 666 F.2d 673 (1st Cir. 1981)("a person has notice of a fact when, from all the information at his disposal, he has reason to know of it." A person may not evade means of obtaining such information. Id., citing Conte v. School Committee of Methuen, 4 Mass. App. 600 (1976) ("the party to a transaction . . . cannot willfully shut his eyes to the means of acquiring knowledge which he knows are at hand and thus escape the consequences which would flow from the notice had it actually been received."). In a case involving ineffective notice, where the Department issued a copy of a superseding determination by certified mail to a conservation commission and the commission simply did not receive it, the appeal period was tolled until the commission had knowledge of the

[5] Tolling has been applied in wetlands cases both as to the ten day period for filing requests for superseding orders and for filing notices of claim for adjudicatory hearings, but the regulatory notice provisions differ. Tolling has also been applied in Chapter 91 cases, where notice of the issuance of a license was not communicated to a party entitled to notice. See Matter of Carol Atkinson Maleska and Barry Dumoulin, Docket No. 2000-043, Final Decision – Order of Dismissal (August 3, 2000); Matter of Community Boating Center, Inc., Docket No. DEP-05-227 and 2004-122 Recommended Final Decision (June 2, 2005). Tolling may be allowed for any party; interestingly, in this matter the copy sent to the Applicant's consultant apparently was also not delivered due to a change of address and was returned to the Department. See Opposition to Motions to Dismiss.

issuance. Matter of Geoffrey Lenk, Docket No. 95-077, Final Decision (Feb. 6, 1996) following Matter of Bay Park Development Trust, Docket No. 88-291, Final Decision (March 31, 1989).

I concur with the Department that the Southeast Regional Office made reasonable efforts to ensure that the superseding order of conditions would be delivered to Ms. Mayer, by using a New York address for Ms. Mayer and a Massachusetts address for the nominee trust. However, the facts support a conclusion that, at the close of the ten day period, neither the copy sent to the address in New York nor the copy sent to the representative of the Trust had been delivered to her. The ten day period begins with issuance, not delivery of the superseding order, but she had no opportunity to appeal without having any notice that the document had been issued. The Department notes that neither the Trust's representative, Rackemann, Sawyer & Brewster, nor Ms. Mayer filed a notice of change in address with the Department.[6] However, there is no evidence that either "willfully shut his eyes" to the means of informing themselves of Department action, particularly as the superseding order was issued after a lengthy period of inactivity in this matter. See Matter of Joseph DeMaio, Docket No. 97-063, Final Decision (April 9, 1998), citing Conte v. School Committee of Methuen, 4 Mass. App. 600 (1976).[7]

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[6] The wetlands statute and regulations do not contain a provision requiring interested persons to notify the Department of changes in name, address or representation. The hearing rules contain such a requirement and clearly state that parties bear the consequences of failure to file and serve such notice, but that provision applies after an appeal for an adjudicatory hearing is filed. 310 CMR 1.01(2). Prior to the filing of an appeal, the issuance of a superseding order would be more akin to a "notice of Department action" where "notice of actions and other communications from the Department hand-delivered or mailed to the person's last known address shall be presumed received upon the day of hand-delivery or, if mailed, three days after the date postmarked." 310 CMR 1.01(3)(b). If applicable, the provision would have required the Southeast Regional Office to use Ms. Mayer's 18 High Street address from her 2005 correspondence and the presumption would have been rebutted by evidence that the document sent to the Trust was not in fact delivered within three days after the date postmarked.

[7] While the statute provides for a 70 day period for the issuance of a superseding order, unusual circumstances lead to issuance on December 19, 2007, more than four years after issuance of the order of

I find that the appeal period was tolled until the Trust had notice of the issuance of the superseding order of conditions. Ms. Mayer, as trustee of the 18 High Street Nominee Trust, received actual notice on January 5, 2007, marking the end of the tolling period. Ms. Mayer filed an appeal on January 7, 2007, within the ten day period after the tolled period ended. Her appeal was therefore timely.

II. The Wetlands Boundary Delineation

The lot where work is proposed was the subject of prior permitting activity. The issue identified for adjudication was whether the bordering vegetated wetland boundary has already been determined in a prior order of conditions, or, if not, whether the boundary is accurate. The chain of events raises the more specific questions of whether a 2001 Determination of Applicability is still valid, whether the boundary established in the 2003 Order of Conditions for File number SE 15-1640 governs the boundary for File number SE 15-1768, and, if so, whether the 2003 order of conditions is still valid because it was properly extended.

A. Facts

A request for determination of applicability dated February 26, 2001 was filed by the F.W. Davidson Trust seeking confirmation of wetlands boundaries on the lot as depicted on a plan. A letter dated July 31, 2001 from The Garrett Group, LTD to the consultant who prepared the Request contains information about the delineation and

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conditions on December 10, 2003. The Trust's representative moved its offices as of October 29, 2007, just six weeks shy of four years after issuance of the order of conditions. Because a notice of intent will expire after two years where an applicant fails to diligently pursue its issuance, including in other forums, the representative of the Trust could reasonably conclude, given the passage of time, that the project was no longer viable and further attention was not warranted. Failure to issue within the 70 day period, however, would not justify tolling of the appeal period. Because there is no remedy in either the statute or regulations for failure to meet the 70 day timeline, it is considered directory rather than mandatory so that the Department retains jurisdiction over a project after the 70 day period has passed. See 310 CMR 10.05(7)(f); Matter of Peter van Rosbeck and Karen van Rosbeck, Docket No. 96-031, Final Decision (June 25, 1996); Gribens v. Department of Environmental Protection, 35 Mass. App. Ct. 1124 (January 31, 1994).

confirms flag locations as adjusted by the Commission. The Commission issued its determination of applicability, based on a revised plan dated August 7, 2001. A notice of intent was submitted in 2001 for the construction of a driveway based upon the boundary established in the determination of applicability as shown on a plan dated August 23, 2001. The Commission issued an order of conditions to F.W. Davison Trust for this work, under file number SE 15-1640, on September 25, 2001. Neither the determination of applicability or the order of conditions for file number SE 15-1640 were appealed. The record includes extension permits for this work issued by the Commission on September 7, 2004 until September 25, 2007 and on October 15, 2007 until September 25, 2010. The order and extensions appear to have been duly recorded. Applicant's Prefiled Testimony, attachments.

New owners, Dr. Stephen and Patricia Sweriduk, filed a notice of intent for the construction of the house that the driveway served, under file number SE 15- 1768, using the same wetlands boundary as shown on the plans for the order of conditions for the driveway under file number SE 15-1640. The Commission issued an order of conditions on December 10, 2003 for this related project. The Petitioner requested a superseding order from the Department for this project, and then appealed the superseding order that was finally issued in December 2007.

B. Discussion

A determination of applicability is valid for a three year period, without provision for extension. 310 CMR 10.05(3)(b). The determination issued for this property in 2001 is clearly no longer valid. Where a determination of applicability establishes a wetland boundary delineation, however, a conservation commission or the Department must

accept the delineation for purposes reviewing a notice of intent and issuing an order of conditions during the three year period. Matter of Pyramid Mall of Holyoke, Docket No. 93-052, Final Decision (November 8, 1993) aff'd sub nom. The Sisters of Divine Providence v. Massachusetts Department of Environmental Protection, C.A. Nos. 93-871, 93-1731 (consolidated)(Hampden Sup. Ct. 1994). Once a boundary determination is incorporated into an order of conditions, it is valid for the three years term of the order, or any longer period if the order is extended pursuant to 310 CMR 10.05(8). The Petitioner is quite correct that a Determination of Applicability may not be extended, but the Applicant does not rely on the Determination but rather the subsequent order of conditions as establishing the boundary here. See Matter of Aversa, Docket No. 2000-101 and 2000-102, Motion Rulings (January 12, 2001), attached as Exhibit 3 to Prefiled Direct Testimony of Curtis R. Young.

The regulations are quite clear that the issuing authority has grounds to deny an extension request where a resource area delineation is no longer accurate. 310 CMR 10.05(8)(b)5. A narrow exception to the "three year rule" was recognized for circumstances of fraud and mutual mistake. See Matter of Kenwood Development Co., Docket No. 97-022, Ruling and Order (January 23, 1998), adopted by Final Decision (June 15, 1998). This exception, even if it were to apply, extends only to the issuing authority's authority as a governmental entity to modify a decision and does not provide an opportunity for third parties to challenge an otherwise binding determination. See Matter of Duffy Brothers Management Co., Inc., Docket No. 98-088, Final Decision (August 9, 1999). Consistent with prior Department rulings, I conclude as a matter of law, that the boundary established in the determination of applicability issued in 2001

was properly incorporated in the order of conditions issued for File No. 1640 in 2001 and the order of conditions for file number SE 15-1768 in 2003. The boundary established in 2001 and incorporated in the 2003 order of conditions for file number SE 15-1768 may not be collaterally attacked by a third party.[8] Therefore, the Petitioner may not challenge the wetlands boundary delineation if the order remains valid.

The wetlands regulations contain provisions governing the extensions of orders of conditions. 310 CMR 10.05(8). An issuing authority may extend an order up to three years, based upon a timely request at least 30 days prior to its expiration. The failure to request at least 30 days in advance is not necessarily fatal. See Matter of West Pond Realty Trust, Dcoket No. 92-130, Final decision (June 14, 1995). Where a commission extended a lapsed order of conditions, the Department dismissed an appeal as a matter of policy because the Department chose not to assert jurisdiction where state courts were the more appropriate forum for challenge of the legality of a municipal extension of an expired permit. Matter of Towermarc Limited Partnership/Eqmarc Joint Venture, Docket No. 97-108 Final Decision (September 30, 1998). The Department plays no role in the issuance of extensions by conservation commissions. Extensions are not identified as an area where a request may be filed for Department action. 310 CMR 10.05(7)(a). An applicant is not required to send a copy of an extension request to the Department. The commission, not the applicant, is required to send a copy of any extension issued to the Department. 310 CMR 10.05(8)(c). The applicant is required to record the extension and send certification of the recording to the issuing authority. The recording provides notice to all interested persons of the status of the order.

[8] A third party in this context means a party other than the issuing authority and the entity to which the permit was issued.

In this case, there was a lapse of approximately three weeks between the date of expiration of the first extension on September 25, 2007 and the issuance of the extension on October 15, 2007; it is not clear whether the request for an extension was made prior to expiration of the order. In addition, the first extension from September 7, 2004 until September 25, 2007 exceeds the three year period allowed for extensions. Nonetheless, the Dartmouth Conservation Commission issued the extensions and Mr. Verissimo duly recorded each extension at the Registry. The Department issued its superseding order for file number SE 15-1768 without verifying the wetlands boundary because it believed it was established in the extended Order for file number SE 15-1640. Department staff investigated the boundary delineation after the appeal was filed, apparently because copies of the extension were not present in the Department's file in the Southeast Regional Office. While the absence of the documentation may have lead to some uncertainty about the status of the order, the presence or absence of copies of the extensions in the Department's files would not appear to have any effect on the legal status of the order.

I conclude, consistent with past Department practice, that the order of conditions for file number SE 15-1640 is valid despite minor lapses in the extension process by the Commission. In the event that the Department's Commissioner declines to continue the policy established in Towermarc and views the prior order no longer binding, I have reviewed the expert testimony offered by the parties related to the accuracy of the boundary delineation. I find that the Petitioner's expert, Curtis R. Young, is qualified as an expert in the delineation of wetlands boundaries. I also find that the Department's witness, Richard Keller, is qualified. The Applicant's witness, Steven D. Gioiosa, is

qualified as an expert in engineering and related areas, but the background information he has provided does not support a conclusion that he has particular expertise in the specialized field of wetlands boundary delineation and he did not perform a field evaluation of the site according to the Department's methodology. Although the Applicant is usually responsible for defending a wetlands boundary shown on a plan, both the notice of intent and the Department's superseding order relied on the boundary delineation in the prior filing until the Department shifted course and revisited the delineation for purposes of this appeal. Thus, I focus on the testimony of Mr. Curtis and Mr. Young.[9]

Their observations at the site were consistent in many respects. By all accounts, the wetlands boundary line, if it were to be determined based on vegetation alone, would be inaccurate because wetlands vegetation clearly extends upland of the flagged line. However, wetlands vegetation is not the sole factor in determining wetlands boundaries. Under the wetlands regulations, the boundary of bordering vegetated wetlands is the line where 50% or more of the vegetation consists of wetlands indicator species and saturated or inundated conditions exist. 310 CMR 10.55(2)(c). In many situations, a predominance of wetlands vegetation is sufficient to establish the boundary, but an issuing authority must evaluate vegetation and indicators of saturated or inundated conditions if submitted by a credible source. Id. Indicators of such conditions include groundwater within the root zone, prolonged or frequent flowing of surface water, or hydric soils. 310 CMR 10.55(2)(c)2. The methodology is further articulated in a Department manual entitled Delineating Bordering Vegetated Wetlands. See Rebuttal of Curtis R. Young, Exhibit R1,

[9] The Petitioner filed a motion to strike portions of the Department's closing brief that included references to testimony. In this Recommended Final Decision, I have relied on the testimony submitted by the witnesses rather than summaries or references to testimony in the briefs.

section on other indicators of hydrology. Accordingly, the experts examined the site for vegetation, soils, and hydrology.

I provide these findings, based upon the testimony:

1. Wetlands vegetation extends upland of the boundary shown on the plan south of the driveway as shown on the plan. The wetlands boundary north of the driveway is not subject to dispute.
2. The areas around the Petitioner's Quadrat A and B do not exhibit hydric soils.
3. Witness testimony conflicts over the presence of oxidized rhizospheres and water stains, so I make no finding as to the presence or absence of these features.
4. At Quadrats A and B, there was "water at 10 to 12 inches below ground surface" as asserted by the Department and more specifically, both free water and soil saturation at Quadrat B and soil saturation at Quadrat A.
5. Based on the rainfall data submitted with Petitioner's rebuttal testimony, recent rain events do not explain the water at 10 to 12 inches below ground surface, as asserted by the Department. Rebuttal testimony of Curtis R. Young, Exhibit R2. The rainfall records show that only 0.01 inches of rain may have fallen on April 24, 2008, the date of Mr. Keller's site visit, and there had been no previous rainfall since April 14, 2008.
6. There was no expert testimony on the reliability of soil saturation within 10 to 12 inches of the surface as a single indicator of hydrology as the basis of establishing a bordering vegetated wetland boundary during the spring season.[10]

[10] There was also no expert testimony on the significance, if any, of the differences between these two observation plots. Quadrat B, located closer to the flagged wetlands line, was described on the Petitioner's Field Data Forms as showing depth to free water within 10 inches, soil saturation to the surface, oxidized rhizospheres and water-stained leaves. Quadrat A, located farther from the flagged line, showed fewer

7. The location of Quadrats A and B are depicted on a plan attached as Exhibit 1 to the Prefiled Direct Testimony of Curtis R. Young. The Department expert, Richard Keller, states that Quadrat B is located approximately 20 feet above flagged wetlands line in the vicinity of flags 53A, 54A, and 55A and Quadrat A is located approximately 40 feet upland of flag 57A. Prefiled Direct Testimony of Richard Keller, issue 3. The Delineation Field Data Forms indicate that Quadrat B is located between Flags 54A and 53A, at 46 feet and 74 feet respectively Quadrat A is 43 feet from Flag 57A. Prefiled Direct Testimony of Curtis R. Young, Exhibit 3.
8. Quadrats A and B are included within the limits of work for the original project plans submitted with the notice of intent.
9. Quadrats A and B are not included within the limit of work depicted on the Applicant's amended plan dated April 15, 2008.
10. Even if Quadrats A and B do show characteristics of vegetation and hydrology sufficient to be identified as bordering vegetated wetlands, there is no evidence to support a conclusion that there is bordering vegetated wetland within the limit of work shown on the amended plan.
11. The Petitioner's opinion that the amended plan will impact over 5,000 square feet of bordering vegetated wetlands is without factual support.

The Petitioner is not required to delineate the entire wetland boundary to sustain its case that the project is within bordering vegetated wetland rather than the buffer zone.

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indicators of hydrology: depth to free water, soil saturation within ten inches, few oxidized rhizospheres, and water-stained leaves. Prefiled Direct Testimony of Curtis R. Young, Exhibit 2. Because the parties submitted their cases on the record and waived cross-examination, there was no opportunity to explore the basis for the expert testimony as to some aspects of the delineation issue.

However, the Petitioner did need to identify at least one location where the project would alter wetlands to support its case. Given the ambiguity of the wetlands boundary, the Applicant has obviously taken steps to resolve this matter by offering an amended plan which shifts the project outside the areas identified as wetlands by the Petitioner.

III. Amended Plan

The Applicant seeks approval of an amended plan. The Petitioner argues that I should not accept the amendment because it comes too late in the process and has had inadequate review. The Department indicates that the amendment would likely meet the terms of the Policy but there has been insufficient opportunity for "back and forth." Department's Closing Brief. I have reviewed the amended plan to determine whether I may accept it under the Department's Plan Change Policy. Administrative Appeals Policy for the Review of Project Plan Changes, DWW Policy 91-1, Issued February 8, 1991, Revised March 1, 1995. The Policy governs the acceptance of project revisions while a project is under appeal.

The Applicant stated at the Prescreening Conference that he was interested in pursuing revisions to the project and a meeting between the Applicant and the Petitioner followed the Conference. Prescreening Conference Report, February 21, 2008.[11] The Amended Plan was submitted with the Applicant's direct case. Specifically, the revised plan shows the elimination of the swimming pool, patio, and retaining wall. According to the Applicant, but disputed by the Petitioner, the revised plans result in a reduction of 10,000 square feet of disturbed area within the buffer zone, an increase in the separation

[11] According to the Prescreening Conference Report, the "applicant stated that he did not intend to pursue construction of the pool and patio area shown on the plans; those structures were in closest proximity to the Petitioner's property. The Petitioner and the applicant's consultant plan to meet to discuss the revisions to the project."

between the flagged wetland line and the limit of work from ten feet to an average of fifty feet, a reduction in fill of 3,000 cubic yards, and a greater undisturbed area between the house and the Petitioner's property allowing the shifting of the position of the swale to twelve to fifteen feet from the property line.

By all accounts, the plan revisions reduce the impact of the project. The Department has taken the position that "a complete and full back and forth analysis" of the plan was not possible; while it was likely to conform to the plan change policy, its "formal submission" into the record based upon the plan change policy was not possible. Therefore, the Department's testimony was addressed to the approval of the original plan. Department's Closing Brief. The Petitioner argues that the plan revisions do not conform to the plan change policy and that allowing it into the record would be unfair because there has not been adequate time for its review by the parties, including the Commission. Therefore, the Petitioner argues that I should reject the plan revision.

The Policy states that the Department will not accept plan changes which "significantly modify the project configuration and which result in increased impacts to wetlands resource areas." Id. The "project configuration" refers to the location of the structural components of the project. The Department may accept changes which "involve unchanged or decreased impacts but which do not constitute significant changes from the project configuration acted upon by a commission." Id. Examples of acceptable changes include "repositioning of structures within the buffer zone to increase the distance from a wetland resource area." Id.

While the Petitioner and the Department are correct that the plan changes were filed at an advanced stage of the hearing, the Policy imposes no such time limitation and

a presiding officer has accepted plan changes during the advanced stage of a hearing. See Matter of Beacon Ocean Shores, Docket No. 2005-204, Recommended Final Decision (March 21, 2007), adopted by Final Decision (September 6, 2008). The Applicant also discussed plan changes at the prescreening conference five months earlier, so the allegation that there was no notice at all is simply incorrect. See Prescreening Conference Report, February 21, 2008. Further, I see no purpose in recommending approval of a project that the Applicant no longer seeks to pursue when the preferred alternative results in less alteration of the buffer zone. While the amended plan is not detailed, a point noted by the Department, the level of detail appears similar to the original plan dated October 19, 2003.

I find that the structures within the buffer zone have been repositioned to increase the distance to the wetland. Much of the changes shown on the plan involve elimination of lawn rather than structures within the buffer zone. The reduction in alteration of buffer zone in proximity to the bordering vegetated wetland will decrease the potential for any impacts. The opportunity for the Petitioner and the Department to review the amended plan may have been brief, the revisions to the hearing rules generally require the parties to act more quickly than in the past. Neither the Petitioner nor the Department have indicated concerns with the plan changes that would lead to a conclusion that other persons not currently parties would be adversely affected by the changes.[12]

IV. Work in the Buffer Zone

Work in the buffer zone of resource areas such as bordering vegetated wetland is review to ensure that the resource areas will not be adversely affected. The regulations in

[12] There is testimony that other parties would be adversely affected by the relocation of the replication area required for file number SE 15-1640, work not subject to this appeal.

effect at the time the notice of intent for this project was filed required that work in the buffer zone contribute to the protection of the interests of the Wetlands Protection Act. 310 CMR 10.03(1)(a)3. The revisions effective in 2005 provide more helpful guidance for work in the buffer zone. 310 CMR 10.53(1). Generally, work in the buffer zone is subject to conditions to protect nearby resource areas. The conditions imposed in the superseding order issued for the original plan include erosion and sedimentation controls, a clear limit of work, prohibition of runoff unto adjacent property and re-establishment of any disturbed vegetation, are consistent with the regulatory standard. The same conditions envisioned for the original project are appropriate for the amended plan as well.

The Applicant states that the amended plan will allow an undisturbed area between the project at the Trust property at 18 High Street. The swale will be relocated to approximately 12 to 15 feet from the property boundary. Prefiled Direct Testimony of Steven D. Gioiosa, para. 9.E. The location of the swale is not depicted on either the original or the amended plan. It appears that the location of the swale between the properties is largely outside of jurisdiction, as the buffer zone does not extend to the 18 High Street property. I assume the swale will be placed entirely within the limit of work as shown on the amended plan. Otherwise, the Applicant's expert, Steven D. Gioiosa, submitted qualified expert testimony that the work in the buffer zone would contribute to the protection of the interests of the Wetlands Protection Act. Prefiled Direct Testimony of Steven D. Gioiosa, para. 7. These assertions were not rebutted by the Petitioner.

The Petitioner has not identified any additional conditions that might be appropriate for the proposed work, instead relying on its assertion that the wetlands

boundary is inaccurate and must be redelineated, followed by a new filing for any work. The Petitioner offers a conclusion about the proposed work. The Petitioner's witness states that the "amended plan proposal will still result in substantial impacts to wetland resource areas and will not meet or comply with the Performance Standards for BVW impacts (310 CMR 10.55). I anticipate that the proposed amended plan development will still impact well over 5,000 square feet of BVW." Rebuttal Testimony of Curtis R. Young. As noted above, this opinion lacks factual support. The burden of going forward is on the party contesting the Department's position. 310 CMR 10.03(2). I find no basis for a conclusion that more than 5,000 square feet of bordering vegetated wetland will be altered by the project. I further find no basis for a conclusion that additional conditions are necessary to protect the wetlands from work in the buffer zone.

Much testimony was directed at the replication area required by the order of conditions for the driveway project under file number SE 25-1640. It apparently has been relocated, to preserve trees, and does not meet the performance standards for replication established in the regulations at 310 CMR 10.55(4)(b). Any relocation of that area and efforts to ensure compliance with the performance standards are beyond the scope of this appeal, but must be addressed through compliance with, amendment to, or enforcement of, that order of conditions. Nonetheless, because the location of the replication area is quite close to the project that would be allowed here, I recommend the inclusion of an additional condition that requires the applicant to submit a plan to the Dartmouth Conservation Commission and the Department for the completion of the replication area, prior to the commencement of work on this new project. The Applicant has indicated an intent to address the replication area. Prefiled Direct Testimony of Jose

Verissimo, para. 12. Although the replication work will continue to be governed by the order of conditions for file number SE 15-1640, the additional condition here will ensure that this unfinished component of the earlier project receives the timely attention it deserves.

V. Standing of Petitioner

Under the wetlands regulations, an abutter must demonstrate standing as a person aggrieved, defined as a person who may suffer an injury in fact which is different in either kind or magnitude than that suffered by the general public and which is within the scope of interests of the Wetlands Protection Act. 310 CMR 10.04 Person Aggrieved. The Department initially moved to dismiss the appeal because the Trust did not support its claim that it is a person aggrieved. Support for this assertion was included in the materials submitted with the Opposition to the Motion to Dismiss, where the Trust's request for a superseding order stated that its property is located upgradient of the locus but the project includes substantial fill which will cause the Trust's property to be downgradient and therefore vulnerable to surface water runoff, flood damage and related impacts. As the superseding order affirmed the local order of conditions, I infered that her grounds for aggrievement would be the same. This assertion was sufficient to survive a motion to dismiss at the initial stage of the proceedings, but I stated that standing must be supported by the Petitioner's direct testimony.

Factual support by the Petitioner's witness focuses on two possible impacts on the adjacent property. First, the witness describes impacts from the siting of the replication area, but the replication work is not relevant because it is governed by the unappealed order of conditions for file number SE 15-1640. Second, the witness describes potential

impacts from a swale that would run between the project and the abutting properties to the north, including the Petitioner's. Mr. Young states that due to saturated soils and the high water table, the swale will become connected with the downgradient wetland and this newly created wetland will have significant monetary impacts on the use of the abutting property. Rebuttal Testimony of Curtis R. Young to Richard Keller, para. 14. As the Department notes, fiscal impacts are not an interest of the Wetlands Protection Act, and the Petitioner has not shown that the Trust's property will be harmed by failure of the project to control flooding or any other wetlands interest. See Standerwick v. Zoning Board of Appeals of Andover, 447 Mass. 20, at 28-32 (2006) (monetary impacts in the context of Chapter 40B).

In fact, the swale is designed to prevent any adverse impacts to neighboring property, but the impacts do not appear to be related to the presence of wetlands. The bordering vegetated wetlands on the Applicant's property do not extend onto the Petitioner's property. Assertions that the swale may become wetland are speculative and remote, and cannot provide grounds for aggrievement. See Matter of Lepore, Docket No. 2003-092 and 2003-093, Recommended Final Decision (September 2, 2004), adopted by Final Decision (December 3, 2004); Matter of Whouley, Docket No. 99-087, Final Decision (May 16, 2000). There is no evidence to support a conclusion that wetlands would be affected by the work at all, and certainly no evidence that Petitioner's property would be harmed by any failure to protect wetlands interests. I conclude, as an alternate grounds for my Recommended Final Decision, that the Petitioner has not demonstrated aggrievement as defined in the wetlands regulations and therefore has not demonstrated standing to appeal.

V. Conclusion

The superseding order of conditions for this project was issued four years after the issuance of the local order of conditions. Because of changes in address in the interim lead to a failure of notice, I tolled the ten day period and accepted the Petitioner's appeal as timely. I conclude that the boundary established in a prior order of conditions, as extended and duly recorded, properly served as the boundary for this project, as a matter of law and policy. I accepted an amended plan proposed by the Applicant, and found, despite ambiguity in the testimony about the hydrology at the site, that the Petitioner had not shown that there were wetland areas within the limit of work for the amended plan, so that it was indeed a buffer zone project. As conditioned, the Petitioner had not shown that the work in the buffer zone as depicted on the amended plan will adversely affect the bordering vegetated wetlands at the site. Finally, as an alternate ground, the petitioner does not have standing as a person aggrieved because the Trust has not shown that the project as proposed in the amended plan will injure Trust property within the scope of interests of the Wetlands Protection Act.

I recommend that a Final Order of Conditions be issued for the amended plan for file number SE 15-1678. The Final Order should include the conditions from the superseding order, reference the amended plan dated April 15, 2008, and include a condition requiring the Applicant to submit a plan to the Department and the Dartmouth Conservation Commission to address the replication area governed by the order of conditions for file number SE 15-1640 prior to commencement of this new work.

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Pamela D. Harvey
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.